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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	APPELLANT'S OPENING BRIEF
Plaintiff/Appellee,)	
)	
vs.)	
)	Case No. 20110775-CA
LOREN OKULY)	
)	
Defendant/Appellant.)	

APPEAL FROM THE JUDGMENT AND CONVICTION ON ONE
COUNT OF CRIMINAL MISCHIEF, A CLASS B MISDEMEANOR, IN
VIOLATION OF UTAH CODE ANN. § 76-6-106(2)(c), IN THE THIRD
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE BRUCE LUBECK, JUDGE PRESIDING.

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

JUN 19 2012

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LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of the parties in the proceedings before the Third Judicial District Court:

JUDGES

The Honorable Bruce Lubeck, Third District Court Judge, presided over the case against Mr. Okuly.

PARTIES

The State of Utah, represented by Melanie Serassio, Assistant District Attorney;

Loren Okuly, Defendant, represented in the Third District Court by Peter D. Goodall, Attorney at Law.

TABLE OF CONTENTS

LIST OF PARTIES IN THE COURT BELOW	ii
CONTENTS OF ADDENDA	v
TABLE OF AUTHORITIES	vi
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED AND STANDARD OF REVIEW	1
RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	3
STATEMENT OF THE CASE	3
Nature Of The Case	3
Course Of Proceedings	4
Disposition In Trial Court	4
Statement Of Material Facts	5
i. <i>The Parties Agreed as to What Happened Leading Up to the Altercation at Issue</i>	5
ii. <i>Mr. Okuly's Testimony Concerning the Altercation</i>	7
iii. <i>Ms. Tischner's Version of the Altercation</i>	10
iv. <i>The Parties Agreed as to What Happened After the Altercation at Issue</i>	11
v. <i>The Medical Evidence Was Inconsistent With Ms. Tischner's Claims</i>	13

vi.	<i>Ms. Tischner Made Several Inconsistent Statements While This Case Was Pending</i>	15
vii.	<i>There Are Unexplained Recording Lapses in the Record.</i>	20
	SUMMARY OF THE ARGUMENT	24
	ARGUMENT	26
	I. THE TRIAL COURT ERRED IN FAILING TO GIVE A REQUESTED JURY INSTRUCTION REGARDING JUSTIFICATION AS A DEFENSE WHERE MR. OKULY TESTIFIED THAT HE TOOK THE ALLEGED VICTIM'S PHONE TO PREVENT HER FROM USING IT AS A WEAPON AGAINST HIM AND DAMAGE ALLEGEDLY CAUSED THEREBY WAS THE BASIS OF THE CRIMINAL MISCHIEF CONVICTION?	26
	II. RECORDING LAPSES IN THE TRIAL TRANSCRIPT REQUIRE A NEW TRIAL WHERE UP TO THIRTY MINUTES OF THE ALLEGED VICTIM'S TESTIMONY WAS NOT RECORDED AND WHERE THE TRIAL COURT'S RECONSTRUCTION THEROF IS INCOMPLETE AND INADEQUATE.	29
	CONCLUSION AND PRECISE RELIEF SOUGHT	32
	REQUEST FOR ORAL ARGUMENT	32
	CERTIFICATE OF COMPLIANCE	33
	CERTIFICATE OF SERVICE	34

CONTENTS OF ADDENDA

- I. JUDGMENT
- II. NOTICE OF APPEAL
- III. RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES & RULES
- IV. MARCH 28, 2012, ORDER SUPPLEMENTING RECORD ON APPEAL

TABLE OF AUTHORITIES

PAGE

CASES CITED:

<i>Briggs v. Holcomb</i> , 740 P.2d 281 (Utah App. 1987)	29
<i>State v. Bryant</i> , 965 P.2d 539 (Utah App. 1998)	2
<i>State v. Harris</i> , 58 Utah 331, 199 P. 145 (1921)	28
<i>State v. Harris</i> , 2004 UT 103, 104 P.3d 1250	29
<i>State v. King</i> , 2010 UT App. 396, 248 P.3d 984	30
<i>State v. Knoll</i> , 712 P.2d 211 (Utah 1985)	28
<i>State v. Menzies</i> , 845 P.2d 220 (Utah 1992)	2, 30
<i>State v. Taylor</i> , 664 P.2d 439 (Utah 1983)	30

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES:

UTAH CONSTITUTION:

Art. I § 12	29
-------------	----

UTAH CODE ANNOTATED:

§ 76-2-401	3, 26, 27
§ 76-2-402	3, 26, 27

§ 76-5-103	4, 27
§ 76-6-106	1, 3, 4, 27
§ 76-6-108	4
§ 77-36-1.1	3
§ 78A-4-103	1

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STATEMENT OF JURISDICTION

This is an appeal from the judgment and conviction of Loren Okuly ("Appellant") on one count of Criminal Mischief, a class B misdemeanor, in violation of Utah Code Ann. §76-6-106(2)(c). (R. at 222-23; Add. I). This Court obtains jurisdiction to hear this appeal of a criminal case from a court of record pursuant to Utah Code Ann. § 78A-4-103(2)(e).

All of the issues raised herein were appropriately preserved through timely objection at trial.

ISSUES PRESENTED AND STANDARD OF REVIEW

I. DID THE TRIAL COURT ERR IN FAILING TO GIVE A REQUESTED JURY INSTRUCTION REGARDING JUSTIFICATION AS A DEFENSE WHERE MR. OKULY TESTIFIED THAT HE GRABBED THE ALLEGED VICTIM'S PHONE TO PREVENT HER FROM USING IT AS A WEAPON AGAINST HIM AND DAMAGE ALLEGEDLY CAUSED THEREBY WAS THE BASIS OF THE CRIMINAL MISCHIEF CONVICTION AT ISSUE?

A trial court's decision and ruling regarding whether to give a requested jury instruction is reviewed for correctness. *State v. Bryant*, 965 P.2d 539, 544 (Utah App. 1998).

This issue was appropriately preserved at trial through a timely objection. The Court gave Defense Counsel leave to reserve an objection as the Court read the jury instructions. (Tr. Vol II p. 422-23).¹

Counsel explained the basis for the objection and requested a justification jury instruction in relation to Counts II and III outside the presence of the jury. (Tr. Vol II p. 423-25). The trial court overruled Defendant's objection and declined to give the requested jury instruction on justification. (Tr. Vol II p. 425).

II. WHETHER RECORDING LAPSES IN THE TRIAL TRANSCRIPT REQUIRE A NEW TRIAL WHERE UP TO THIRTY MINUTES OF THE ALLEGED VICTIM'S TESTIMONY WAS NOT RECORDED AND WHERE THE TRIAL COURT'S SUBSEQUENT RECONSTRUCTION IS INCOMPLETE AND INADEQUATE.

The sufficiency of a trial court's reconstruction of the record is reviewed for an abuse of discretion. *State v. Menzies*, 845 P.2d 220, 223 (Utah 1992).

This issue was preserved for review through the filing of Appellant's motion to remand the case for reconstruction of the record pursuant to rule 11(h) of the Utah Rules of Appellate Procedure. This issue was further preserved by the filing of the document entitled "Position of Defendant Regarding Reconstruction of Trial Record" where

¹ Volume I of the trial transcript is found in the record on appeal at p. 239; Volume II is found at p. 240.

Appellant argued that “[g]iven the number of lapses, their combined and individual durations, and given the importance of the unrecorded testimony, the record in this case cannot be reconstructed.” (R. at 268).²

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following relevant constitutional provisions, statutes and rules are referred to in Appellants’ Brief and are reproduced at Addendum III: Article I, Sections 7 and 12 of the Constitution for the State of Utah; Utah Code Ann. §76-6-106, §76-2-401, §76-2-402, and Rule 19 of the Utah Rules of Criminal Procedure.

STATEMENT OF THE CASE

A. Nature of the Case

An Information filed on or about September 20, 2010, charged Appellant as follows: Count I, Aggravated Assault (Domestic Violence), a third degree felony in violation of Utah Code Ann. §76-5-103; Count II, Criminal Mischief (Domestic Violence Enhancement under Utah Code Ann. Utah Code Ann. §77-36-1.1), a class A misdemeanor in violation of Utah Code Ann. §76-6-106; Count III, Damage To or Interruption of a Communication Device (Domestic Violence Enhancement under Utah Code Ann. Utah Code Ann. §77-36-1.1), a class A misdemeanor in violation of Utah Code Ann. §76-6-108. (R. at 1-4).

² Citations to the record on appeal shall be made as follows: (R. at [page number]).

B. Course of Proceedings

Following a preliminary hearing on January 18, 2011, Appellant was bound over on one third degree felony and two class B misdemeanors. There were no predicate prior convictions such that the State dismissed the domestic violence enhancements to Counts II and III. Appellant was bound over to stand trial on the following charges: Count I, Aggravated Assault (Domestic Violence), a third degree felony in violation of Utah Code Ann. §76-5-103; Count II, Criminal Mischief (Domestic Violence), a class B misdemeanor in violation of Utah Code Ann. §76-6-106; Count III, Damage To or Interruption of a Communication Device (Domestic Violence), a class B misdemeanor in violation of Utah Code Ann. §76-6-108. (R. at 238; prelim. trans. at 70).

C. Disposition in Trial Court

On January 18, 2011, Defendant was bound over for trial on one third degree felony and two class B misdemeanors. Defendant was tried by a jury of his peers on June 14 and June 15, 2011. At the conclusion of trial, the jury acquitted Appellant of Count I, Aggravated Assault and Count III, Interruption of a Communication Device. The jury convicted Defendant on Count II, criminal mischief, a class B misdemeanor. [R. at 214-15; Jury Verdict].

D. Statement of Material Facts

i. The Parties Agreed as to What Happened Leading Up to the Altercation at Issue

In August, 2010, Mr. Okuly and Ms. Tischner were dating. Ms. Tischner resided in Mr. Okuly's house temporarily while she looked for a more permanent residence. (Tr. Vol. I, p. 66-67). On August 13, 2010, Ms. Tischner went to a friend's wedding, Ms. Tischner was the maid of honor at her friend's wedding. (Tr. Vol. I, p. 68). Ms. Tischner attended the wedding and the reception following thereafter. (Tr. Vol. I, p. 69). She attended the festivities until approximately 11:45pm. (Tr. Vol I, p. 70). Ms. Tischner admitted that she "probably" drank more than eight beers that night. (Tr. Vol I, p. 126). She further testified that she was more drunk that night than she had ever been. *Id.* Nonetheless, she received a ride to Mr. Okuly's home from a designated driver, her ex-husband, and arrived at the Okuly residence at approximately midnight. (Tr. Vol. I, p. 71). Ms. Tischner testified that she continued drinking at Mr. Okuly's house and then went to bed. (Tr. Vol. I. p. 75).

Ms. Tischner testified that she and Mr. Okuly had gotten into an argument over the phone earlier that evening about whether Mr. Okuly would go to the wedding reception and who Ms. Tischner would get a ride home with. (Tr. Vol. I, p. 72-73). Ms. Tischner

locked the bedroom door when she went to bed. (Tr. Vol. I, p. 77).

During this time, Mr. Okuly was not at the wedding but he was attended a friend's birthday party. (Tr. Vol. II, p. 293). There was a large group of people at this party. Mr. Okuly knew several of them very well, but there were many people there he either did not know or did not know well. *Id.* The party started at Derek Fox's house. *Id.* Mr. Fox lives in a house very near Mr. Okuly's residence, His house is approximately one hundred yards from Mr. Okuly's. (Tr. Vol. II, p. 294, 386). The party went to a venue in the downtown Salt Lake City area and then returned to Mr. Fox's house between 1:00 a.m. And 2:00 a.m. (Tr. Vol. II, p. 294).

Shortly after arriving at Mr. Fox's home, Mr. Okuly walked home to his own house. (Tr. Vol. II, p. 295). He tried to get into his room to go to bed but noticed that Ms. Tischner had locked the door. (Tr. Vol. II, p. 295). Mr. Okuly then took his dog for a walk back over to Mr. Fox's house. Mr. Okuly testified that he socialized with friends at Mr. Fox's house from approximately 2:00 a.m. to approximately 3:00 a.m. (Tr. Vol. II, p. 297).

Mr. Okuly noticed that the door to his bedroom was still locked. He obtained a toothpick and used it to pick the bedroom door lock. The locks in Mr. Okuly's house are constructed in such a way that this is very easy to do. *Id.*

The parties' testimony was fairly consistent to this point. However, Mr. Okuly's version of events for what happened once he entered the bedroom differed drastically to that of Ms. Tischner.

ii. Mr. Okuly's Testimony Concerning the Altercation

Mr. Okuly's testimony was consistent with the jury's not-guilty verdicts. He testified that, after he unlocked the bedroom door with a toothpick, he turned the lights on for a moment, and then got into his bed. Ms. Tischner was in his bed. (Tr. Vol. II, p. 297). Ms. Tischner began screaming at Mr. Okuly, demanding that he leave. She simultaneously began physically kicking him repeatedly in the back as he laid down. She kicked him at least five times till she “actually kicked [Mr. Okuly] with enough force to knock [him] clear off the bed and fall onto the floor.” (Tr. Vol. II at 297-98). Mr. Okuly then took a blanket, left the bedroom, and proceeded downstairs to sleep on the couch. (Tr. Vol. II at 298-99). Ms. Tischner was left with a sheet and a blanket and stayed in the bed. (Tr. Vol. II at 300).

After laying on the couch downstairs for five or ten minutes, Mr Okuly went back upstairs to his bedroom to sleep in his bed. (Tr. Vol. II at 299, 301). The door was not locked and Ms. Tischner was still laying on the bed. (Tr. Vol. II at 300). Mr. Okuly took

the blankets from the bed and threw them down the hallway. At the time he intended Ms. Tischner to chase the blankets down the hall giving him an opportunity to enter his bedroom to go to sleep. (Tr. Vol. II at 301). By this point in time, there had been no hostile touching between the parties aside from Ms. Tischner physically kicking Defendant out of the bed. (Tr. Vol. II at 302).

Ms. Tischner got up, but she did not go get the blankets as Mr. Okuly had intended. Instead Ms. Tischner hit Mr. Okuly. (Tr. Vol. II at 302). Mr. Okuly, in response, said, "Did you seriously just hit me?" Ms. Tischner replied, "No" and hit Mr. Okuly a second time. Mr. Okuly, in response, said, "That's two." Ms. Tischner hit Mr. Okuly a third time. Mr. Okuly, in response, said, "Three." Ms. Tischner hit Mr. Okuly a fourth time. Mr. Okuly, in response, said, "Four." Ms. Tischner hit Mr. Okuly a fifth time. Mr. Okuly, in response, said, "Five." Ms. Tischner hit Mr. Okuly a sixth time. Mr. Okuly, in response, said, "Six." Ms. Tischner hit Mr. Okuly a seventh time. Mr. Okuly, in response, said, "Seven." Ms. Tischner hit Mr. Okuly an eighth time. Mr. Okuly, in response, said, "Eight." Ms. Tischner hit Mr. Okuly a ninth time. Mr. Okuly, in response, said, "Nine." Mr. Okuly stopped counting after either the tenth or eleventh time that Ms. Tischner hit him. (Tr. Vol. II at 304-05). During this entire time, Mr. Okuly did not fight back in any way. He "just stood there and accepted it." (Tr. Vol. II at 305-

06).

Mr. Okuly testified that Ms. Tischner's phone was definitely in her hand the last time she hit him. She was hitting him with her phone. (Tr. Vol. II at 305-06). He believed that the phone was in her hand the entire time that she was hitting him but he declined to say he was sure on this point. (Tr. Vol. II at 306). However, Mr. Okuly was sure that Ms. Tischner was hitting him with her phone on her last strike because he took her phone from her hand so she would stop hitting him with it. (Tr. Vol. II at 306-07).

Mr. Okuly grabbed Ms. Tischner's arm with his right hand and disarmed her of her phone with his left hand. (Tr. Vol. II at 307). As Mr. Okuly disarmed Ms. Tischner and stopped her from hitting him, she fell to ground as though she were sitting down. (Tr. Vol. II at 308). Mr. Okuly did not push her down but she fell to the ground. (Tr. Vol. II at 309).

Derek Fox is a good friend of Mr. Okuly. He testified that Mr. Okuly called him from the jail shortly after his arrest and told him what happened. The version of events that Mr. Okuly testified to was similar in all material respects to how he testified at trial. (Tr. Vol. II at 402).

Mr. Okuly did not let go of Ms. Tischner's arm and he fell to the ground with her. (Tr. Vol II at 311). Mr. Okuly held Ms. Tischner's arm across her chest momentarily, for a

“couple of seconds” and said, “You need to stop. Stop. Stop. Stop.” Then Mr. Okuly “jumped up” and “ran down the hall.” (Tr. Vol. II at 313). Mr. Okuly ran into his room and locked the door. (Tr. Vol. II at 314).

iii. Ms. Tischner's Version of the Altercation

Ms. Tischner testified that she woke to Mr. Okuly poking her with a toothpick. (Tr. Vol. I, p. 76-77). She testified that he then ripped the covers from her. She testified that a struggle ensued over the covers. Mr. Okuly was trying to remove them while Ms. Tischner was holding onto them. This struggle started in the bedroom and continued into the hallway. (Tr. Vol. I, p. 78).

Ms. Tischner testified that she was facing away from Mr. Okuly, Mr. Okuly was behind her, and Mr. Okuly pushed her down the stairs. (Tr. Vol. I, p. 81). Ms. Tischner testified that she fell all the way to the bottom of the stairs and then immediately started walking back up the stairs towards Mr. Okuly. (Tr. Vol. I, p. 83). Ms. Tischner said that she did this to get her phone, that she testified was in Mr. Okuly's possession, to call for a ride. (Tr. Vol. I, p. 83).

She testified that she asked for her phone to call for a ride. (Tr. Vol. I, p. 84). She testified that Mr. Okuly threatened to plug it into his computer to see who she had been

talking to. (Tr. Vol. I, p. 84-85). As they were arguing over the phone, Ms. Tischner testified that she threatened to call the police unless she received her phone. (Tr. Vol. I, p. 85). She testified that Mr. Okuly began hitting her on her arms repeatedly with her phone as she blocked the blows. (Tr. Vol. I, p. 86-87). She testified that Mr. Okuly finally threw her phone down the stairs. (Tr. Vol. I, p. 84-85).

Ms. Tischner then testified that Mr. Okuly put her on the ground and held her down at the top of the stairs. She testified that Mr. Okuly choked her by pressing the back of his arm against her throat as he pinned her down at the top of the stairs. (Tr. Vol. I, p. 88). Ms. Tischner testified that she couldn't breathe. (Tr. Vol. I, p. 91). She testified that Mr. Okuly then left her and proceeded to enter his bedroom. *Id.*

iv. *The Parties Agreed as to What Happened After the Altercation at Issue*

The parties both testified that after Mr. Okuly fled from Ms. Tischner and locked himself in his bedroom, Ms. Tischner did not immediately leave the house. She followed Mr. Okuly to his bedroom and began banging on his door. She eventually started kicking the door and actually cracked the door. (Tr. Vol. II at 314-15, Tr. Vol I at 172). As Ms. Tischner beat and kicked the door, she cracked it in two places. One crack was in the middle of the door and another crack ran down the edge of the door by the latch. (Tr. Vol.

II at 317).

After breaking Mr. Okuly's bedroom door, Ms. Tischner left the house. (Tr. Vol. I at 95). Mr. Okuly did not prevent her from leaving, he had locked himself in his bedroom. (Tr. Vol. II at 317). Ms. Tischner ran to Derek Fox's house where she saw people sitting on the front porch. (Tr. Vol. I at 95-96). Ms. Tischner borrowed the phone of a Mr. Chad Scarborough. She said she was going to call her mother but she in fact used the phone to immediately call 911. (Tr. Vol. I at 96; Vol. II at 279).

Officer Moore was the first officer to respond to the scene. (Tr. Vol. I at 97). Officer Elkins arrived shortly thereafter and spoke with Ms. Tischner. (Tr. Vol. I at 99). He took photos of Ms. Tischner at the scene. (Tr. Vol. I at 102). Ms. Tischner testified that her mother took some photos of her that morning and that Officer Elkins took additional photographs at approximately 9:00 p.m. that night. (Tr. Vol. I at 103). Ms. Tischner conceded from the stand that the photos did not clearly show any bruising but she testified that the bruises developed a few days later. (Tr. Vol. I at 106-07). Officer Elkins eventually took Mr. Okuly into custody. (Tr. Vol. I at 220).

Derek Fox testified that he was Mr. Okuly's best friend and had a key and a key code to enter Mr. Okuly's house. (Tr. Vol. II at 389, 392). Mr. Fox met Ms. Tischner at Mr. Okuly's residence just before noon on August 14, 2010. He did not observe any

injuries on Ms. Tischner's person. (Tr. Vol. II at 391-92). Ms. Tischner told Mr. Fox that she wanted to move out of the residence, and Mr. Fox offered to help Ms. Tischner move her belongings out of the house. Ms. Tischner indicated that she would call Mr. Fox the next day to make arrangement to move out of Mr. Okuly's residence. (Tr. Vol. II at 393). However, Ms. Tischner did not call Mr. Fox the next day. Mr. Fox saw Mr. Okuly's lights on later that night and went to his friend's house to investigate. (Tr. Vol. II at 394). He saw Ms. Tischner inside the residence with a man that Mr. Fox did not recognize. Mr. Fox knocked on the door. Ms. Tischner did not answer the door, instead she called the police and police arrived and told Mr. Fox he had to leave. Ms. Tischner did not call Mr. Fox the next day. (Tr. Vol. II at 394-95).

v. *The Medical Evidence Was Inconsistent With Ms. Tischner's Claims*

Dr. Mark Stevens testified in this case. He is a board certified emergency room physician. (Tr. Vol. I at 43). Dr. Stevens testified that he treated Ms. Tischner on August 14, 2010. Ms. Tischner was complaining of neck pain. Dr. Stevens diagnosed Ms. Tischner with a cervical strain, which means strained muscles in the neck. (Tr. Vol. I at 44-45). Dr. Stevens ordered an X-ray of Ms. Tischner's neck. Upon reviewing the X-rays, he noticed no soft tissue swelling and normal alignment. (Tr. Vol. I at 45). Dr.

Stevens testified that the radiologist, who also reviewed the x-rays at issue, noticed “non-displaced fracture of c2 spinous process.” Dr. Stevens then explained, “it means that there was a subtle abnormality on the X-ray that the radiologist noted, but it wasn't – it wasn't clearly a fracture.” (Tr. Vol. I at 46).

Dr. Stevens further testified that injuries like those he observed during his examination of Ms. Tischner could “occur lots of different ways,” including a deceleration injury, choking, falling, playing sports, or being in a car wreck. (Tr. Vol. 1 at 47).

Dr. Stevens testified that, during his tenure as an emergency room physician, he had seen other patients come in after complaining of having fallen down stairs. Head injuries resulting in a sub-dural hematoma were the most common injury that Dr. Davies associated with being thrown down stairs. (Tr. Vol. I at 48-49). However, the only injury Ms. Tischner presented was neck pain. (Tr. Vol. I at 50).

Dr. Stevens testified that Ms. Tischner's medical record indicated that she arrived at the hospital at 9:53 p.m. on August 14, 2010. And that she was discharged at 10:47 p.m. (Tr. Vol. I at 52). There was some discrepancy as to the time she went to the ER and the time she met with Officer Elkins on the evening of August 14, 2010. Both Ms. Tischner and Officer Elkins testified that Ms. Tishner went to the ER before Officer

Elkins met with her. However, both Officer Elkins and Ms. Tischner testified at the preliminary hearing in this case that he met with Ms. Tischner between 8 p.m. and 8:30 p.m. (Tr. Vol. I at 223-24, 226).

Ms. Tischner lied to Dr. Davies claiming that she did not use alcohol. (Tr. Vol. I at 53). Ms. Tischner did not tell Dr. Davies that she had been drinking heavily when she incurred her neck pain. (Tr. Vol. I at 53-54). Dr. Davies noted no bruising anywhere on Ms. Tischner's body. There were no red marks on Ms. Tischner's neck, and she had no trouble breathing. (Tr. Vol. I at 55).

Dr. Davies testified that Ms. Tischner's moderate neck pain could have been caused in any number of ways. (Tr. Vol. I at 56). He testified that if someone had been strangled for two to four minutes such that the person was unable to breathe, he'd have expected to see marks on the neck. (Tr. Vol. I at 57). There were no marks on Ms. Tischner's neck. (Tr. Vol. I at 57).

vi. Ms. Tischner Made Several Inconsistent Statements While This Case Was Pending

During the course of this case, Ms. Tischner gave her description of what happened to Officer Elkins, she gave a written statement on September 25, 2010, she was interviewed by Ron Edwards, a defense investigator on October 20, 2010, and she

testified at the preliminary hearing in January, 2011. (Tr. Vol. I at 128).

Ms. Tischner told Officer Elkins that Mr. Okuly woke her by physically removing her from the bed. She told Officer Elkins that Mr. Okuly dragged her to the stairs and threw her down the stairs. (Tr. Vol. I at 132). She told Officer Elkins that she started to ascend the stairs, asking for her phone, and that Mr. Okuly then threw her phone down the stairs. Contrary to her testimony at trial, Ms. Tischner told Officer Elkins that Mr. Okuly grabbed her by the hair, knocked her to the ground, and strangled her. (Tr. Vol. I at 232). Ms. Tischner told Officer Elkins that Mr. Okuly strangled her for two to three minutes. (Tr. Vol. I at 232). On redirect, Officer Elkins testified that she told him she had trouble breathing for two to three minutes. (Tr. Vol. I at 237). She told Officer Elkins that she then broke free from Mr. Okuly and fled the residence. (Tr. Vol. I at 232). She did not tell Officer Elkins that, before she left the residence, Mr. Okuly locked himself in his bedroom and Ms. Tischner violently kicked the bedroom door to the point of breaking it trying to get at him. (See Tr. Vol. II at 233, 314-15, Tr. Vol I at 172).

On September 25, 2010, Ms. Tischner hand wrote a statement that Mr. Okuly later typed, emailed, and printed. Ms. Tischner signed and had notarized both the handwritten statement and the typed statement. (Tr. Vol. I at 114-15). The Statement that Ms. Tischner prepared, signed, and had notarized on September 25, 2010, read in pertinent

part as follows:

“To whom it may concern. On August 14 , 2010 I called the police wanting a ride to my mom’s house because Loren and I were not getting along and I was too drunk to drive. The police asked me to fill out a statement and I chose not to at first. It wasn’t until Draper City officer got me emotionally worked up that I decided to give a statement. I was too drunk, however, to complete the statement, and the statement was hard to read.

“The next day I copied what I had wrote onto my own – my own paper so that it was legible. When I was copying what I had wrote, I remember not feeling comfortable turning in the statement because I didn’t remember the events that I had described to have actually happened.

“About the only thing I do remember is feeling very upset about the person he – police described Loren to be. [The Court redacted some inadmissible content at this point in the letter] Unfortunately I am an extremely jealous person, and it is not something that I am proud of. I am also not proud of drinking so much that I did not remember the night.

“Loren doesn’t know that I am giving this statement to add to the file. This is something I have chosen to write, because morally I cannot sit back and let a man get punished for something that I do not believe happened. I believe I was in an emotional state of mind, as I consumed more alcohol that night than I ever have in one given night. I have chosen to write this letter based on my own morals and needing to tell the truth. Michelle K. Tischner.”

(Tr. Vol. I at 142). The foregoing statement was entered into evidence and published to the jury. *Id.* Ms. Tischner testified that it was her idea to write the foregoing statement. *Id.*

On October 20, 2010, Ms. Tischner was interviewed by defense investigator, Ron Edwards. A no contact order was in place preventing Mr. Okuly from speaking with or

otherwise contacting Ms. Tischner. Ms. Tischner testified that Mr. Okuly honored that order and that, at the time she spoke with Ron Edwards, she had not had contact with Mr. Okuly since September 27, 2010. (Tr. Vol. I at 143). The statement Ms. Tischner gave to Mr. Edwards was inconsistent with her testimony at trial and was admitted and published to the jury on that basis. (Tr. Vol. I at 147).

In her interview with Ron Edwards, Ms. Tischner first stated that did not “remember much of the night” and admitted that she had a lot to drink on the night in question. She told him that she remembered being at the neighbor's house but that she did not remember going over there. (Tr. Vol. I at 149). She told Mr. Edwards that she remembered an argument inside the house but that, other than that, she did not “remember much from that night.” (Tr. Vol. I at 153).

Ms. Tischner reiterated that she had not had contact with Mr. Okuly for three weeks prior to her interview with Ron Edwards, that Mr. Edwards did not put any pressure on her to make the statement, and that she consulted with and was represented by counsel in relation to this case when she spoke with Mr. Edwards. (Tr. Vol. I at 154).

On January 18, 2011, Ms. Tischner testified at the preliminary hearing in this case. She was questioned about her prior testimony at trial. (Tr. Vol. I at 155). She testified at the preliminary hearing that she remembered going down the stairs but wasn't sure if Mr.

Okuly pushed her down the stairs. (Tr. Vol. I at 159). She testified that it was possible that she stumbled down the stairs.

On August 18, 2011, four days after the alleged assault, Ms. Tischner wrote a letter to Mr. Okuly. This letter was entered into evidence at trial. In that letter, Ms. Tischner described Mr. Okuly as her “knight in shining armor,” as “Mr. Perfect,” and described him as follows: “Zero tolerance for drugs, educated, spiritually on the same page, loves [Ms. Tischner's daughter] and good with kids, has goals and direction, no crybabies, and won't let me walk all over them.” (Tr. Vol. I at 160). When Ms. Tischner wrote that letter, there was a no contact order in place and she had not spoken with Mr. Okuly since the date of the alleged assault. (Tr. Vol. I at 161). While this no contact was order was still in place, Ms. Tischner repeatedly contacted Derek Fox in an effort to get messages to Mr. Okuly since, in accordance with the court order, Mr. Okuly refused to have contact with her. (Tr. Vol. I at 162-63). In one text message to Mr. Fox, Ms. Tischner described how much her daughter missed Mr. Okuly. In another text message, she described a statement that she wrote that she wanted to forward to Mr. Okuly's attorney to assist him with resolving the charges. (Tr. Vol. I at 163).

On September 18, 2010, Ms. Tischner called Mr. Okuly more than 14 times in approximately one hour from midnight to 1:00 am. Mr. Okuly missed most of those calls

but he spoke with Ms. Tischner at least once during that period. (Tr. Vol. I at 166). On September 19, 2010, Ms. Tischner called seven times between midnight and 3:37 am. Mr. Okuly spoke to her twice during this period. (Tr. Vol. I at 168). On September 19, 2010 at 3:37am, Ms. Tischner broke up with Mr. Okuly by sending him a text message saying, “We're done. You got what you wanted. That's me as a stranger.” (Tr. Vol I at 170; Vol II at 320).

vii. There Are Unexplained Recording Lapses in the Record.

The trial at issue was, for the most part, audio recorded in accordance with pertinent court rules and procedures. However, the transcript in this case reflects an alarming number of recording lapses. They, along with the context in which they occurred are described below.

A recording lapse is noted on page 92 of the trial transcript. Ms. Serassio, for the State is questioning Ms. Tischner, the alleged victim, on direct. Ms. Serassio is questioning Ms. Tischner about her allegation that Mr. Okuly hit her with his fist. (Tr. Vol. I at 92-93). The recording stops from 12:21:04 through 13:34:37, “There is no explanation on the record for this time lapse.” (Tr. Vol. I at 93). The timing of this lapse suggests that the lunch break was included. Nonetheless, at least some relevant

questioning regarding allegations that Mr. Okuly hit Ms. Tischner with his fists was not recorded. *Id.*

The trial court, following a hearing on remand, found that, during this lapse in recording, Ms. Tischner testified that she went to the bedroom to use a phone. Mr. Okuly denied her entry to the bedroom so she kicked the door until it cracked. She testified that her dress was ripped and she testified to various injuries she complained of. She tried to use the home phone but it was inoperable, her own phone was missing the battery (which she found the following day), and though she screamed outside for help, nobody came. (See Add. IV at 2-3)

A recording lapse is noted on page 110 of the transcript. Ms. Tischner was still on the stand during the State's direct examination. Ms. Serassio was asking her about certain photographs that allegedly showed developing bruises. There is a recording lapse from 13:52:47 to 13:56:29. "There is no explanation given on the record for this time lapse." (Tr. Vol. I at 110). The questioning resumes when Ms. Serassio asks the court if "we need[ed] to go back." The court responded in the negative and Ms. Serassio continued asking Ms. Tischner about her next entry into My. Okuly's home following his arrest. *Id.*

The trial court, following a hearing on remand, found that, during this lapse in recording, Ms. Tischner was presented with several photos of her person. She further

testified that she was crying and had makeup running down her face. She testified that Mr. Okuly was still in the house when she left. (Add. II at 3).

On page 159 there is a lapse in the recording from 14:48 to 15:00. Again, there is no explanation on the record for this lapse. (Tr. Vol. I at 159). Ms. Tischner is still on the stand. Defense counsel is cross-examining her regarding inconsistent testimony she gave at the preliminary hearing in this case. When the recording resumes, Counsel has moved on to an entirely different line of questioning laying foundation for the admission into evidence of a letter Ms. Tischner wrote to Mr. Okuly shortly after the alleged assault. (Tr. Vol. I at 160).

The trial court, following a hearing on remand, found that, during this lapse in recording, Ms. Tischner explained that she testified at the preliminary hearing that she did not see Mr. Okuly push her down the stairs. She testified at the preliminary hearing that she may have been drunk. She testified, at trial, that she went to the ER before meeting with Officer Elkins but was shown an ER report indicating otherwise given Officer Elkins' statement that she met with him at around 8:00 pm. She testified that she has a facebook account with over 1,000 friends but denied posting Mr. Okuly's booking photo. She testified that Mr. Okuly was under a no contact order on August 15, that she obtained a protective order on August 16, and that she wrote and signed a letter, exhibit 26, on

August 17, 2012. (Add. IV at 5-6)

Yet another recording lapse is reflected on Page 172 of the trial transcript from 15:16 to 15:19. Ms. Tischner is still testifying on cross-examination. Defense Counsel is asking her about her actions following the alleged assault. Ms. Tischner admitted that she did not tell Officer Elkins that, after the alleged assault, Mr. Okuly hid and locked himself in his bedroom, that she pursued him and kicked the door, or that she broke the door. When the recording resumed, Ms. Tischner was testifying regarding her continued use of her phone following the damage allegedly cause by Defendant during the alleged assault. (Tr. Vol. I at 172-73).

The trial court, following a hearing on remand, found that, during this lapse in recording, Ms. Tischner was shown exhibit 9 and admitted breaking Mr. Okuly's door. She testified that she continued to use her phone following the alleged assault as it was working once she put the battery in. (Add. IV at 6).

On page 421 of the trial transcript, there is a recording lapse from 11:19 to 11:27. (Tr. Vol. II at 421). Ms. Serassio is questioning Ms. Tischner on direct examination in rebuttal regarding a conversation she had with Mr. Okuly on April 5, 2011. When the recording begins again the court is instructing the jury. (Tr. Vol. II at 421).

The trial court, following a hearing on remand, found that, during this lapse in

recording, Ms. Tischner testified that Mr. Okuly recounted virtually the same series of events that he described at trial. The Court then began to read jury instructions. The trial court concluded that little substantive recording was lost during this lapse. (Add. IV at 6).

SUMMARY OF THE ARGUMENT

In the instant case, a new trial is warranted for two independent reasons: the trial court failed to properly instruct the jury and there were recording lapses in the trial record that deprive Mr. Okuly of his right to meaningful appellate review.

This case involved allegations of domestic violence. Mr. Okuly testified that Ms. Tischner, the alleged victim, hit him up to ten times with her phone in her hand. He testified that Ms. Tischner was using her phone as a weapon. He further testified that, after the tenth hit, he took her phone, threw it aside, told Ms. Tischner to stop, and went into his bedroom where he locked the door and hid from Ms. Tischner who incidentally proceeded to kick a hole in Mr. Okuly's bedroom door while he hid inside.

The jury apparently believed Mr. Okuly because they found him not guilty of Aggravated Assault and not guilty of Interruption of a Communication Device. However, because the trial court declined to give a requested instruction on justification in relation

to Count III, the jury was compelled to return a guilty verdict for Criminal Mischief, a Class B misdemeanor. Technically Mr. Okuly testified that he did intentionally grab Ms. Tischner's phone, and there was some evidence that he thereby damaged the property of another. However, he only did so to prevent Ms. Tischner's continued assault. Under these circumstances, the trial court should have instructed the jury on justification as it applied to Count III, Criminal Mischief.

There was a malfunction with the recording equipment at trial. As a result, up to thirty minutes of Ms. Tischner's testimony was not recorded. Where only she and Mr. Okuly were present for the interaction at issue and where her testimony was the substantive evidence supporting the charges in this cases, this failure to record prevents meaningful appellate review and a new trial is warranted.

Although the trial court attempted to reconstruct this record, it did not do so accurately or completely and, most importantly, there is no record as to objections made during the lapse in recording or the rulings thereupon. Under these circumstances, Mr. Okuly is prejudiced and a new trial is warranted.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO GIVE A REQUESTED JURY INSTRUCTION REGARDING JUSTIFICATION AS A DEFENSE WHERE MR. OKULY TESTIFIED THAT HE TOOK THE ALLEGED VICTIM'S PHONE TO PREVENT HER FROM USING IT AS A WEAPON AGAINST HIM AND DAMAGE ALLEGEDLY CAUSED THEREBY WAS THE BASIS OF THE CRIMINAL MISCHIEF CONVICTION?

Pursuant to Utah Code Ann. §76-2-401 “The defense of justification may be claimed: (a) when the actor's conduct is in defense of persons or property under the circumstances described in Sections 76-2-402 through 76-2-406 [of the Utah Code].” Utah Code Ann. §76-2-401. Utah Code Ann. §76-2-402 states, in turn, that “A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.”

In the instant case, Mr. Okuly testified that Ms. Tischner was hitting him repeatedly with her phone. He testified that she was using her phone as a weapon against him. (Tr. Vol. II at 304-06). He further testified that he disarmed her by taking her phone from her possession. (Tr. Vol. II at 306-07). It was at this time that the damage to Ms. Tischner's phone, if any, occurred. The jury, by finding Mr. Okuly not guilty of Aggravated Assault and Interruption of a Telecommunication Device, appears to have

believed Mr. Okuly's version of events over the testimony of Ms. Tischner.

Even with this testimony though, because the jury was given inadequate instruction as to the law insofar as it could not consider justification as a defense, the jury was compelled to convict Mr. Okuly given the jury instruction regarding Criminal Mischief.

Under Utah Code Ann. §76-6-106 “A person commits criminal mischief if the person . . . intentionally damages . . . the property of another.” (*see* R. a 200, jury instruction regarding criminal mischief). Moreover, under Utah Code Ann. §76-2-103 “A person engages in conduct: (1) Intentionally . . . when it is his conscious objective or desire to engage in the conduct” Utah Code Ann. §76-2-103; *see also* R. at 189 (Jury Instruction regarding intent). Mr. Okuly testified that he intentionally took Ms. Tischner's phone from her and there was evidence that the phone was damaged in the process. Under the preceding statutory definitions, such conduct would technically constitute Criminal Mischief.

However, Mr. Okuly was disarming Ms. Tischner of a weapon. He used reasonable force against Ms. Tischner when he grabbed the phone out of her hand to stop her from hitting him with it. This conduct is, therefore, justified under Utah Code Ann. §76-2-401 and 402. Yet the jury was compelled to enter a conviction where it was denied

the opportunity to consider justification as a defense.

Had Mr. Okuly, after enduring as many as ten blows from Ms. Tischner, used reasonable force by pushing her or even hitting her, the defense of justification would clearly be appropriate for the jury's consideration. Here, Mr. Okuly used less force than that. He took Ms. Tischner's phone, which she was using as a weapon, and it was damaged in the process. Under these circumstances, the jury should have been permitted to consider justification as a defense.

A jury should be instructed as to justification and its vitiating effect on criminal responsibility when there is a basis in the evidence which would provide some reasonable basis for the jury to conclude that conduct was justified. *State v. Knoll*, 712 P.2d 211, 214 (Utah 1985). “[T]here need only be 'sufficient evidence of [the defendant's] justification to create in the mind of the jury a reasonable doubt of his culpability for the offense charged' to justify the giving of an instruction on the point.” *Id.* at 215; quoting *State v. Harris*, 58 Utah 331, 199 P. 145, 147-48 (1921).

In this case, Mr. Okuly's testimony provided sufficient a quantum of evidence to justify the giving of a jury instruction on justification. Where the trial court denied Mr. Okuly's request for such an instruction, reversal is appropriate.

II. RECORDING LAPSES IN THE TRIAL TRANSCRIPT REQUIRE A NEW TRIAL WHERE UP TO THIRTY MINUTES OF THE ALLEGED VICTIM'S TESTIMONY WAS NOT RECORDED AND WHERE THE TRIAL COURT'S RECONSTRUCTION THEROF IS INCOMPLETE AND INADEQUATE.

The right to a direct appeal from a criminal conviction is an important part of Utah's jurisprudence concerning criminal law. This right is, in fact, specifically protected in the Utah Constitution. Constitution of Utah, Art. I §12. This protection implies the right to meaningful appellate review. To this end, an accurate record of proceedings before the trial court is essential. See *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah App. 1987) (“Although consistently making a record of all proceedings imposes a greater burden on the trial court and court reporters, it is impossible for an appellate court to review what may ultimately prove to be important proceedings when no record of them has been made.”). See also *State v. Harris*, 2004 UT 103 at ¶33-35, 104 P.3d 1250 (recognizing right to complete record on appeal).

There is no more important proceeding in any criminal case than the testimony of an alleged victim at trial especially where, as was the case here, there were only two people present when the crime was alleged to have been committed: the defendant and his accuser. Ninety minutes of Ms. Tischner's testimony was not recorded. Even allowing for a lunch hour, as the trial court found, up to thirty minutes of the alleged

victim's testimony was not recorded.

Granted, where a record of proceedings is incomplete or inadequate, an appellant is under a duty to correct or complete the record. However, where reconstruction so as to permit meaningful and comprehensive appellate review is not possible, a new trial is warranted. *State v. Taylor*, 664 P.2d 439 (Utah 1983).

The missing testimony was from the victim and the only witness, besides Mr. Okuly, to the events at issue. This testimony was essential to the State's case and important to the jury's deliberations.

Moreover there were five distinct lapses in recording covering very different parts of Ms. Tischner's testimony, and on more than one occasion the examination moved on to another line of questioning by the time the recording resumed. Given the number of lapses, their combined and individual durations, and given the importance of the unrecorded testimony, the record in this case could not be reconstructed with sufficient certainty to permit meaningful appellate review.

Granted, “[A] new trial will not be granted unless it is shown that the transcription errors prejudiced [an appellant's] appeal.” *State v. King* 2010 UT App 396 at ¶54, 248 P.3d 984; quoting *State v. Menzies*, 845 P.2d 220, 228 (Utah 1992); but see *State v. Taylor*, 664 P.2d 439, 447 (Utah 1983) (“When faced with claims that a juror's responses to voir dire questions demonstrated actual bias, this Court is not at liberty on appeal to assume what those answers

showed when they are totally absent from the record and cannot be reconstructed by agreement of the parties.”).

In the instant case, the trial court made an effort to describe what occurred during the lapses in the trial transcript. (R at 291- 199; Add. IV). While the trial court described the general substance and topic of the testimony it did not do so with specificity. For example, on page 5 of the courts order (R. at 295) the court describes a discrepancy as to whether Ms. Tischner went to the E.R. before or after her interview with Officer Elkins. The trial court supplemented the record as follows:

She said she went to see a doctor first and then Elkins. She was shown Def Exhibit 1, an Emergency Room report, which shows otherwise, that she saw Elkins before the doctor. She said she did not recall the time she met with Elkins but Elkins said at the preliminary hearing that he, Elkins, met with Tischner at 8:00 pm.

(R. at 295, Add. IV at 5). The trial court describes a discrepancy in the testimony but fails to give context to permit its meaning to be discerned with clarity.

More importantly, the same paragraph of the trial court's order contains the following apparent inaccuracy. The trial court concluded that Ms. Tischner testified the she did not post Defendant's mugshot on her facebook page. *Id.* Yet Defendant's Exhibit 22, which is included in the record on appeal, clearly shows Mr. Okuly's mug shot posted on Ms. Tischner's facebook page. The trial court's reconstruction of the record is, therefore, either demonstrably incorrect or incomplete and Mr. Okuly is prejudiced as a result.

Mr. Okuly is prejudiced by the lapses in the record notwithstanding the trial court's

attempt to reconstruct it for a far more fundamental reason: it makes no record of objections or the courts rulings thereon. The rules of issue preservation mean that appellate issues are most likely found where there is an objection. Here, there is no record of Mr. Okuly's objections and, likewise, there is no record of the trial court's associated rulings. Therefore, Mr. Okuly's opportunity to prepare his appeal and to identify potential issues that warrant investigation is curtailed. Mr. Okuly is prejudiced as a result. Therefore, a new trial is warranted and his conviction on one count of criminal mischief, a Class B misdemeanor should be reversed.

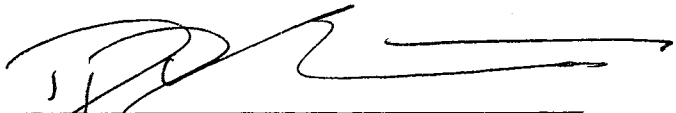
CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Appellant, Mr. Okuly, respectfully requests this Court to reverse his conviction and to remand the case to the trial court for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests oral argument in the above matter.

RESPECTFULLY SUBMITTED this 19th day of June, 2012.



PETER D. GOODALL
Attorney for Defendant / Appellant

Form 17. Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief **complies** with the type-volume limitation of Utah R. App. P.24(f)(1) because:

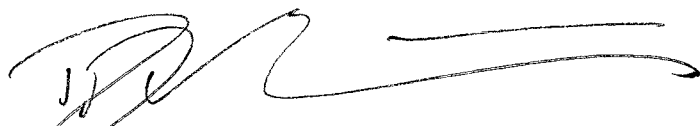
☒ this brief contains 7,639 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or

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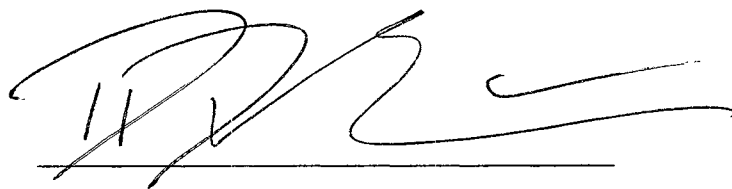
Attorney's or Party's Name

Dated: 6/19/12

CERTIFICATE OF SERVICE

I hereby declare that I mailed/delivered two true and correct copies of the foregoing Appellant's Opening Brief, postage prepaid, this 19th day of June, 2012, to:

Laura Dupaix
Assistant Attorney General
Criminal Appeals Division
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114

A handwritten signature in black ink, appearing to be "LD", written over a horizontal line.

ADDENDUM I
Judgment

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
 :
vs. : Case No: 101402100 FS
LOREN ROBERT OKULY, : Judge: BRUCE LUBECK
Defendant. : Date: July 18, 2011

PRESENT

Clerk: loriaw
Prosecutor: SERASSIO, MELANIE M
Defendant
Defendant's Attorney(s): GOODALL, PETER D

DEFENDANT INFORMATION

Date of birth: May 20, 1980
Audio
Tape Number: 32 Tape Count: 9.16-9.28

This case involves domestic violence.

CHARGES

2. CRIMINAL MISCHIEF - Class B Misdemeanor
Plea: Guilty - Disposition: 06/15/2011 Guilty

SENTENCE JAIL

Based on the defendant's conviction of CRIMINAL MISCHIEF a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)
The total time suspended for this charge is 180 day(s).

SENTENCE FINE

Charge # 2 Fine: \$1000.00
Suspended: \$800.00
Surcharge: \$112.11
Due: \$200.00

Total Fine: \$1000.00
Total Suspended: \$800.00
Total Surcharge: \$112.11
Total Principal Due: \$200.00
Plus Interest
Restitution Amount: \$500.00 Plus Interest
Pay in behalf of: MICHELLE TISCHNER

ORDER OF PROBATION

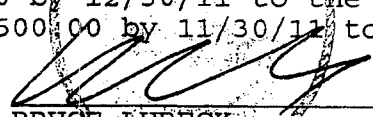
The defendant is placed on probation for 12 month(s).
Probation is to be supervised by S.L. County Probation Services.
The imposition of sentence is stayed and the defendant is placed on probation.

Defendant is to pay a fine of 200.00 which includes the surcharge.
Interest may increase the final amount due.
Pay fine to The Court.

PROBATION CONDITIONS

No other violations.
Comply with Salt Lake County probation services.
Notify the court of any address change.
Timely payments of all fines, attorney fees and restitution.
No contact directly or indirectly with the victim.
Report to SL County probation within 24 hours.
Complete 16 week domestic violence course.
Pay a fine in the amount of \$200.00 by 12/30/11 to the Court
Pay restitution in the amount of \$500.00 by 11/30/11 to the Court

Date: 19 July 2011


BRUCE LUBECK
District Court Judge

ADDENDUM II
Notice of Appeal

Peter D. Goodall, USB No. 9718
Attorney for Defendant
825 N. 300 W., Ste N-224
Salt Lake City, Utah 84103
Phone: (801) 990 1873
Fax: (801) 990 1874
goodalldefense@gmail.com

FILED
THIRD DISTRICT COURT
JUL 18 2011
WEST JORDAN DEPT.

IN THE THIRD DISTRICT COURT, WEST JORDAN DEPT.
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

LOREN OKULY,

Defendant.


NOTICE OF APPEAL

Case No. 101402100

JUDGE BRUCE LUBECK

Defendant, Loren Okuly, by and through counsel, Peter Goodall, hereby appeals the guilty verdict, judgment, and sentence in the above-captioned case to the Utah Court of Appeals. On June 15, 2011, following a jury trial, the Honorable Judge Lubeck presiding, Defendant was convicted of one count of Criminal Mischief, a class B misdemeanor. On July 18, 2011, the same Court sentenced Defendant in relation to said conviction. Defendant appeals the conviction, associated judgment, and sentence in this case. He does not appeal the judgments of acquittal associated with Counts I and III in the above-captioned case. Nothing in this pleading constitutes a waiver of Defendant's right against being twice put in jeopardy in relation to charges he was acquitted of.

DATED this 18th day of July, 2011.


Peter D. Goodall
Attorney for Defendant

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on the 8 day of July, 2011, a true and correct copy of the foregoing Notice of Appeal, was served by hand delivery or United States First Class Mail, postage prepaid, addressed to the following:

Melanie Serassio
Assistant Salt Lake District Attorney
8080 South Redwood Rd., Ste 1100
West Jordan, Utah 84088



ADDENDUM III
RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES & RULES

Utah Constitution

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Code

76-6-106. Criminal mischief.

(1) As used in this section, "critical infrastructure" includes:

(a) information and communication systems;

(b) financial and banking systems;

(c) any railroads, airlines, airports, airways, highways, bridges, waterways, fixed guideways, or other transportation systems intended for the transportation of persons or property;

(d) any public utility service, including the power, energy, and water supply systems;

(e) sewage and water treatment systems;

(f) health care facilities as listed in Section _____, and emergency fire, medical, and law enforcement response systems;

(g) public health facilities and systems;

(h) food distribution systems; and

(i) other government operations and services.

(2) A person commits criminal mischief if the person:

(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

(b) intentionally and unlawfully tampers with the property of another and as a result:

(i) recklessly endangers:

(A) human life; or

(B) human health or safety; or

(ii) recklessly causes or threatens a substantial interruption or impairment of any critical

infrastructure;

(c) intentionally damages, defaces, or destroys the property of another; or

(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

(3) (a) (i) A violation of Subsection (2)(a) is a third degree felony.

(ii) A violation of Subsection (2)(b)(i)(A) is a class A misdemeanor.

(iii) A violation of Subsection (2)(b)(i)(B) is a class B misdemeanor.

(iv) A violation of Subsection (2)(b)(ii) is a second degree felony.

(b) Any other violation of this section is a:

(i) second degree felony if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of \$5,000 in value;

(ii) third degree felony if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of \$1,500 but is less than \$5,000 in value;

(iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of \$500 but is less than \$1,500 in value; and

(iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than \$500 in value.

(4) In determining the value of damages under this section, or for computer crimes under Section , the value of any item, computer, computer network, computer property, computer services, software, or data includes the measurable value of the loss of use of the items and the measurable cost to replace or restore the items.

(5) In addition to any other penalty authorized by law, a court shall order any person convicted of any violation of this section to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all expenses incurred in responding to a violation of Subsection (2)(b)(ii), unless the court states on the record the reasons why the reimbursement would be inappropriate.

76-2-401. Justification as defense -- When allowed.

(1) Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:

(a) when the actor's conduct is in defense of persons or property under the circumstances described in Sections through of this part;

(b) when the actor's conduct is reasonable and in fulfillment of his duties as a governmental officer or employee;

(c) when the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis, as limited by Subsection (2);

(d) when the actor's conduct is reasonable discipline of persons in custody under the laws of the state; or

(e) when the actor's conduct is justified for any other reason under the laws of this state.

(2) The defense of justification under Subsection (1)(c) is not available if the offense charged involves causing serious bodily injury, as defined in Section , serious physical injury, as defined in Section , or the death of the minor.

76-2-402. Force in defense of person -- Forcible felony defined.

(1) (a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) (a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute "combat by agreement":

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4) (a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section _____, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

- (a) the nature of the danger;
- (b) the immediacy of the danger;
- (c) the probability that the unlawful force would result in death or serious bodily injury;
- (d) the other's prior violent acts or violent propensities; and
- (e) any patterns of abuse or violence in the parties' relationship.

ADDENDUM IV
MARCH 28, 2012, ORDER SUPPLEMENTING RECORD ON APPEAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY,
WEST JORDAN DEPARTMENT, STATE OF UTAH

FILED
THIRD DISTRICT COURT
MAR 28 2012
WEST JORDAN DEPT.

STATE OF UTAH, Plaintiff, vs. LOREN ROBERT OKULY Defendant.	ORDER Case No. 101402100 Judge BRUCE C. LUBECK DATE: March 28, 2012
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The above matter came before the court for determination of the supplemental record on appeal.

BACKGROUND

Defendant was charged with aggravated assault, a third degree felony, and other misdemeanors. A jury trial was held June 14 and 15, 2011, and the jury acquitted defendant of all counts except a Class B Misdemeanor of Criminal Mischief. Defendant was sentenced on July 18, 2011, to be on probation and to pay a fine. He filed a notice of appeal that same date.

The Utah Court of Appeals issued an order, entered in this court on December 6, 2011, staying the appeal and partially remanding the case to this court to determine the reasons for gaps in the transcript and to provide an accurate record.

A hearing was scheduled and continued at the request of the parties and eventually held March 12, 2012. Defendant on February 2, 2012, filed a notice that neither he nor counsel

could recall what was stated in the gaps in the transcript. AT the hearing held March 12, 2012 the State indicated it would file a recreation of the record as best it could. The court ruled that after receipt of that recreation, it would adds its input from its notes and issue an order as to how the record is to be supplemented. The State provided that record on March 27, 2012.

This is that order after careful review of the State's position and the court's own notes.

DISCUSSION

The transcript is not complete because of a computer malfunction. For no apparent reason the computer recording would simply stop and it was not noticed by the court staff. The judge has no way of knowing when the recording is not working. No device or mechanism is available to the judge so that the judge can see that the recording is not working. Thus, the "gaps" are the fault of no one except the faulty recording system. The origin of those malfunctions is unknown but the problem has been remedied and no longer occurs.

The court's notes as to approximate times vary somewhat from the computer time as shown in the transcript and in the court minutes. The court is in the practice of writing down the times when various aspects of the trial occur, such as jury selection,

opening statements, the time a witness begins testimony on direct examination, the time when cross examination begins, the time of closing arguments, and so forth. The court uses the clock on the court room wall and not the computer time, so the times vary somewhat from the "official" docket times shown in the minutes and the transcript.

There are five "gaps" in recording. The court has notes from each of those. The court has also reviewed the State's version of the testimony at those times.

(1) The first gap in the recording, from page 93 of the transcript begins at 12:28 pm on the first day of trial, June 14, 2011. Michelle Tischner, the complaining witness, took the stand at 11:55 am and the court broke for the lunch hour at approximately 12:30 p.m., and resumed at 1:35 pm. Thus, most of the "gap" is the lunch hour, all but approximately 7 or 8 minutes. The transcript, page 92, shows Tischner was testifying about defendant hitting her in the head with his hand and he had a phone in his hand.

Tischner testified she then went to the bedroom to use a phone. Defendant would not open the door so she kicked the door open and cracked the door but she did not see

that then but defendant later told her she had cracked the door.

Tischner was mad and said she was going to call the police. Tischner said she had a bruised face and ripped dress, the dress was loose and not bunched up. She said the side of her body hurt and she had been hit in the face, on the arms and chest. Tischner said defendant left and she tried the regular telephone and it did not work. She screamed and ran outside calling for help, but no one came. She had picked up her cell phone which was on the floor by the television but the battery was not in it. She returned the next day and found the battery.

At that point the noon recess occurred until about 1:35 pm.

(2) Tischner was still on the stand after the trial resumed after the lunch hour. The transcript at page 110 shows there was another gap from approximately 1:52 to 1:56. Tischner was still undergoing direct examination and cross examination began about 2:15 pm.

After identifying various photographs as shown in the transcript:

Tischner was again shown exhibits 3-8, photos of 3-chest, 4-chest, 5-back of arm, 6-arm, 7-arm, and

8-bruise on arm. She said she was upset and crying and had makeup streaking her face and her eyes were swollen. Defendant was still in the house when she left.

The transcript then resumes as shown at the bottom of page 110.

(3) The next gap in the transcript on page 159 is from 2:48 until 3:00 pm. That was during cross examination of Tischner, which began approximately 2:15 and continued until 3:35 pm.

Tischner said at the preliminary hearing on January 18, 2011, she said she did not know if defendant pushed her down the stairs. She was referred to page 26 line 22 and said she could be drunk. She said she went to see a doctor first then Elkins. She was shown Def Exhibit 1, an Emergency Room report, which shows otherwise, that she saw Elkins before the doctor. She said she did not recall the time she met with Elkins but Elkins said at the preliminary hearing that he, Elkins, met with Tischner at 8:00 pm. On August 15 (the offense was August 14) defendant got out of jail and was given a no contact order. Tischner said she had a Facebook page with 1129 friends but she did not post a mug shot of defendant. She got a protective order on August 16 and to obtain that said defendant had choked her and threw her down the stairs. On

August 17 she wrote a letter, identified her signature, and that was received as Exhibit 26. The transcript then resumes at page 160.

(4) The transcript at page 172 shows a gap from 3:16 to 3:19. Tischner, again, was still undergoing cross examination before a recess at approximately 3:20 and redirect examination began of Tischner after the recess.

Tischner the next day was shown Exhibit 9, a photo of the broken door, and stated she did indeed break the door. She said the cell phone, still worked after the battery was put in but she got a new phone. The transcript then resumes on page 173.

(5) On page 421 of the transcript on June 15, 2011, a gap is shown from 11:19 to 11:27. Tischner was again on the witness stand in rebuttal, defendant having rested at approximately 11:10 a.m.

Tischner was being asked about meeting with defendant and defendant said the same story he told in court. Tischner added nothing new in this rebuttal at that point which took perhaps one minute of unrecorded time. The State rested and the court began its jury instructions. This

portion of the missing transcript contains virtually nothing of importance and included only about one minute of testimony and was mostly the written jury instructions which are part of the record.

The transcript resumes with the court reading from the jury instructions, and the court had been reading those for approximately 5 minutes when the recording began to function again.

ORDER

The existing transcript should also include the above indented material in each of the five instances where the recording equipment failed and it was not noticed for a few moments.

This is ordered to be the supplemental record which conforms to the truth under Utah Rules of Appellate Procedure, Rule 11(h). The court makes these findings based on input from the parties and its own notes taken at the trial and its best memory of the testimony. It is ordered to be a supplement to the transcript already provided to the Utah Court of Appeals.

Any party, pursuant to that rule, may object. Otherwise

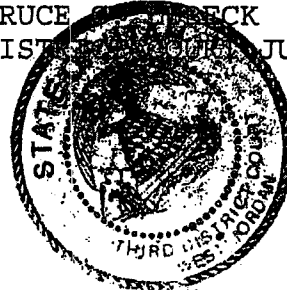
this order shall be part of the record on appeal.

DATED this 28 day of Mar, 2012.

BY THE COURT.



BRUCE E. BECK
DISTRICT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 101402100 by the method and on the date specified.

MAIL: PETER D. GOODALL 825 N 300 W STE N-224 SALT LAKE CITY, UT 84103

BY HAND: STATE OF UTAH

Date: 03/28/2012

/s/ RHONDA MEEKS

Deputy Court Clerk